

STATE OF MICHIGAN  
SUPREME COURT

**MARY A. DONOHO**  
Plaintiff-Appellee,

Supreme Court no. 127537

v

Court of Appeals no. 256525

**WAL-MART STORES, INC**  
**INSURANCE CO OF THE STATE OF PENNSYLVANIA**  
Defendants-Appellants.  
\_\_\_\_\_ /

Lower Court no. 03-000235

**BRIEF AMICUS CURIAE IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF THE BASIS FOR THE  
JURISDICTION OF THE COURT**

The Court can review the order and opinion that the Workers' Compensation Appellate Commission entered in *Donoho v Wal-Mart Stores, Inc*, 2004 Mich ACO 142, lv den unpublished order of the Court of Appeals, decided on October 29, 2004 (Docket no. 256525) by the authority of the second sentence of MCL 418.861a(14). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697, n 3, 732; 614 NW2d 607 (2000).

## STATEMENT OF QUESTION PRESENTED

### I

#### **DOES *PRORATE* MEAN *TO DIVIDE PROPORTIONATELY*?**

Plaintiff-appellee Donoho answers "No."

Defendants-appellants Wal-Mart Stores  
Ins Co of the State of Pa answer "Yes."

Amicus curiae Michigan Self-Insurers' Ass'n answers "Yes."

Court of Appeals denied leave to appeal.

Workers' Compensation Appellate Comm answered "No."

Board of Magistrates answered "No."

## STATEMENT OF FACTS

May A. Donoho (Employee) hired David M. Stewart (Lawyer) and filed an application for mediation or hearing with the Bureau of Workers' and Unemployment Compensation<sup>1</sup> claiming that Wal-Mart Stores, Incorporated, and Insurance Company of the State of Pennsylvania (Employer) had to pay the costs of the medical care that was needed after a personal injury arising out of and in the course of employment and a penalty for failing to pay when the bills were first submitted. *Application for mediation or hearing*, 1. The Employer appeared and denied responsibility in a carrier's response. *Carrier's response*, 1. The Bureau then remitted the case to the Board of Magistrates for hearing and disposition.

The Board allowed the Employee to ask that the Employer pay the fee of the Lawyer in addition to the costs of the medical care and the penalty. And after hearing, the Board ordered the Employer to pay the costs of the medical care which was documented, a penalty of \$1,500.00, and thirty percent of the costs of the medical care as the fee of the Lawyer. *Donoho v Wal-Mart Stores, Inc*, unpublished order and opinion of the Board of Magistrates, decided on May 1, 2003 (Docket no. 050103001). (Appendix DD)

The Workers' Compensation Appellate Commission affirmed. *Donoho v Wal-Mart Stores, Inc*, 2004 Mich ACO 142. (Appendix CC)

The Court of Appeals denied leave to appeal. *Donoho v Wal-Mart Stores, Inc*, unpublished order of the Court of Appeals, decided on October 29, 2004 (Docket no. 256525). (Appendix BB)

The Court ordered arguments on "the correct interpretation of MCL 418.315(1)" to decide whether to grant leave to appeal or peremptorily dispose of an

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<sup>1</sup> Now the Workers' Compensation Agency because of Executive Reorganization Order No. 2003-1.

application for leave to appeal that was filed by the Employer. *Donoho v Wal-Mart Stores, Inc*, 472 Mich 944; - NW2d - (2005). (Appendix AA)

## ARGUMENT

### I

#### ***PRORATE MEANS TO DIVIDE PROPORTIONATELY.***

*Prorate* is American English. It has been in continuous use since first appearing in 1860 as a composite from the English *pro rata*, which was in use there from 1575 when borrowed from the Latin *prō ratā* meaning *according to the part figured for each*. *Prō* is the Latin preposition meaning *for* in English. *Ratā* is the ablative case singular of *ratus* and past participle of *rēri* meaning *to count* or *to reckon*. Barnhart, *Chambers Dictionary of Etymology* 851 (The H.W. Wilson Co 2001).

The common and accepted use of *prorate* then and now is as a verb meaning *to divide proportionately*. *The Oxford American College Dictionary* 1089 (GP Putnam's Sons 2002). *Webster's New Collegiate Dictionary* 924 (G & C Merriam Co 2003). *Prorate* has never had another usage. Certainly, it has no special meaning in law as both *Black's Law Dictionary* (8th Ed) 1257 (Thomson West 2004) and *A Dictionary of Modern Legal Usage* (2nd Ed) 706 (Oxford University Press 1995) describe *prorate* only as a verb meaning *to divide or assess proportionately*.

This usage of *prorate* as a verb meaning *to divide proportionately* must apply to the last sentence of MCL 418.315(1), which states that, "The worker's compensation magistrate may *prorate* attorney fees at the contingent fee rate paid by the employee." (emphasis supplied) because MCL 8.3a states that,

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

Two words in the last sentence of section 315(1) signal this common usage of *prorate* as a verb meaning *to divide proportionately*. One is *magistrate* and the other is *rate*.

*Magistrate* indicates that *prorate* is used as a verb because *magistrate* is the subject of the last sentence of section 315(1) as a person or thing that can take action. It is followed by *prorate* that logically describes the kind of action required, which is the function of a verb.

The object in the last sentence of section 315(1) is *fees* or *attorney fees*. However, a sentence composed of only the subject, verb, and object in the last sentence of section 315(1) — *The worker's compensation magistrate may prorate attorney fees* — has little meaning. More information is needed. And more information is supplied by the restrictive subordinate clause *at the contingent fee rate paid by the employee*. This is a restrictive subordinate clause because it modifies or explains the action by the subject — the verb *prorate*. That is, *at the contingent fee rate paid by the employee* modifies the verb *prorate* by describing how that action can be taken and completes the idea of the sentence.

*Rate* signals that *prorate* means *to divide proportionately* by explaining exactly how to measure or quantify the division for *rate* is a noun meaning *measure* or *quantity*. *The Oxford American College Dictionary* 1125.

The next to the last sentence of section 315(1) informs the meaning of *prorate* as *to divide proportionately* by stating that,

"If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate."

Plainly, the next to the last sentence is the predicate for the last sentence of section 315(1) to apply. When the Board orders an employer to pay all of the costs of the medical care to the injured employee, there is no other person with whom to *prorate* or divide the attorney fee. Only when the Board orders an employer to reimburse the costs of



medical care to the employee and to pay the unpaid costs to a provider such as a doctor, hospital, or lab whose bill is not paid — as allowed by the next to the last sentence of section 315(1) — then there are two (or three or four) people between whom the attorney fee can actually be prorated or divided proportionately by the terms of the last sentence of section 315(1).

*Attorney fees cannot be added to the cost of the medical care that an employer must pay because prorate means to divide proportionately, not to add. Add means to join something to something to increase the amount or size. The Oxford American College Dictionary 13. Schoolchildren understand this. Every schoolchild knows that to add one scoop of ice cream to another means more. And that dividing or sharing one scoop of ice cream means less.*

The Legislature also understands this. MCL 418.801(3) allows adding an amount of money — up to \$1,500.00 — to the amount of the costs of medical care to be paid by stating,

"If medical bills or travel allowance are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, \$50.00 or the amount of the bill due, whichever is less, shall be **added** and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid. Not more than \$1,500.00 in total may be added pursuant to this subsection." (emphasis supplied)

The last sentence of section 315(1) would have to be changed to allow adding an attorney fee to the cost of the medical care that an employer pays. *Prorate* and *at the contingent fee rate* would have to be expunged and replaced with *add* or

FROM

The worker's compensation magistrate may ~~prorate~~ attorney fees ~~at the contingent fee rate~~ paid by the employee

TO

The worker's compensation magistrate may **ADD** attorney fees paid by the employee.

Such an alternative is real construction of a statute in the sense of *to build*. The verb changes meaning from *to divide proportionately* to *increase the amount*. The restrictive subordinate clause — *at the contingent fee rate* — disappears. While the Court may construe a statute, it may not construct as the Court said in the case of *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101-102; 643 NW2d 553 (2002) that,

"our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. See, e.g., *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). In other words, the role of the judiciary is not to engage in legislation. *Tyler v Livonia Public Schs*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999)."

**RELIEF**

Amicus curiae Michigan Self-Insurers' Association asks the Court to reverse the order and opinion that the Workers' Compensation Appellate Commission entered.

Respectfully submitted,

**CONKLIN, BENHAM, DUCEY,  
LISTMAN & CHUHRAN, P.C.**

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